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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

WHIRLPOOL CORPORATION,

Petitioner,

v.

WILFRED H. VANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. After determining that the district court did not have jurisdiction over a cause under the Age Discrimination in Employment Act, may the court grant plaintiff leave to refile and equitably modify the statute of limitations provided for in Section 7(e) of that Act to accommodate such a procedure?

2. After determining that the District Court had no jurisdiction, may a court of appeals allow the jury's finding concerning the equitable tolling of the 180-day filing period of Section 7(d)(1) of the Age Discrimination in Employment Act to stand, when the case is refiled and retried pursuant to the erroneous procedures described in Question 1 above?

3. When plaintiff had actual knowledge of rights conferred by the ADEA more than 180 days prior to filing a charge, may a court of appeals determine that equitable tolling of the Section 7(d)(1) 180-day filing period is warranted?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

WHIRLPOOL CORPORATION,

Petitioner,

v.

WILFRED H. VANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Whirlpool Corporation,[1] seeks a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered on May 10, 1983 and August 29, 1983, with rehearing denied on October 27, 1983.

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[1] Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Petitioner-Whirlpool Corporation: Brastemp S.A. (Sao Paulo, Brazil); Consul S.A. (Joinville, Brazil); Embraco, S.A. (Joinville, Brazil); Inglis, Limited (Toronto, Canada).

OPINIONS BELOW

The initial opinion of the court of appeals (App. A, *infra*, at A1-A14) is reported at 707 F.2d 483. The court of appeals' Supplemental Opinion on Petition for Rehearing (App. B, *infra*, at A15-A23) is reported at 716 F.2d 1010.

JURISDICTION

The original judgment of the court of appeals was entered on May 10, 1983. Respondent Vance filed a timely petition for rehearing on May 23, 1983. The court of appeals then issued a supplemental opinion, modifying its initial decision, on August 29, 1983. A timely petition for rehearing, with a suggestion that the rehearing be held en banc, was filed by Whirlpool on September 10, 1983 and denied on October 27, 1983 (App. C, *infra*, at A24). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This case arises under the provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (hereinafter "ADEA").

STATUTORY PROVISIONS INVOLVED

The provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which are the subject matter of the questions for review, are as follows:

1. Section 7(d) of the ADEA, which provides as follows:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been

filed with the Commission. Such a charge shall be filed—

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(d) (1980).

2. Section 7(e) of the ADEA, 29 U.S.C. § 626(e) (1980), which provides that Section 255 of Title 29 shall apply to ADEA actions. Section 255, governing statutes of limitation, provides in relevant portion:

> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

29 U.S.C. § 255 (1976).

STATEMENT OF THE CASE

Whirlpool discharged Wilfred H. Vance on May 3, 1977. On May 1, 1979, Vance simultaneously mailed a charge alleging a violation of the Age Discrimination in Em-

ployment Act to the Secretary of Labor and commenced a civil action in the district court (App. A, *infra*, at A2, A4).

After denial of Whirlpool's motion for summary judgment on the grounds that Vance had not complied with the 60-day period for conciliation required by the ADEA, and had not filed his charge within the statutorily prescribed 180-day period, the case was tried to a jury. A verdict was entered in Vance's favor including special verdicts on the two issues raised by motion. Whirlpool's appeal followed (*Id.*).

In its original opinion, rendered May 10, 1983, the court of appeals held that the 60-day conciliation period of § 7(d) was a jurisdictional prerequisite, and therefore not subject to equitable modification (App. A, *infra*, at A5-A12). The court therefore vacated the district court's judgment and remanded the case with instructions to dismiss the complaint (*Id.* at A12-A13). The court, however, granted Vance leave to refile following proper conciliation, and held that the statute of limitations could be equitably modified in order to accommodate such a procedure (*Id.* at A13-A14). The Fourth Circuit stated that its modification was proper on two grounds: (1) there was no demonstration of prejudice to Defendant from refiling; and (2) its determination that Vance's simultaneous filing with the Secretary of Labor and the District Court was "not unreasonable" (*Id.*). Since the court concluded that the 60-day conciliation period precluded jurisdiction in the district court, it specifically declined to reach the issue of the jurisdictional dimensions of the 180-day requirement or the circumstances under which it might be tolled (*Id.* at A14 n.7).

Following the Fourth Circuit's original decision, Vance filed a Petition For Rehearing suggesting, among other things, that the court consider and resolve the issues regarding the 180-day requirement of the statute. The court did not request Whirlpool to answer Vance's Petition For Rehearing and Whirlpool was constrained from doing so on its own under Fed. R. App. 40.

Following Vance's Petition For Rehearing, the Fourth Circuit supplemented its original opinion on August 29, 1983 and disposed of the issue whether Vance had complied with the 180-day requirement of the ADEA. The court determined that the 180-day requirement of Section 7(d)(1) was not jurisdictional, but rather could be equitably tolled where circumstances warranted (App. B, *infra*, at A16-A19). The court then proceeded to find that the district court was correct in holding that the 180-day period should be tolled because of Whirlpool's failure to post statutory notice (*Id.* at A19-A20). Holding that the jury's finding that Vance had filed a timely charge was supported by substantial evidence in the record, the court concluded that the district court acted properly in holding that the 180-day filing period had been tolled until Vance retained an attorney in April of 1979 (*Id.*). Judge Widener dissented from the Fourth Circuit's Supplemental Opinion, on the grounds that the court had no jurisdiction to decide the question by virtue of its earlier decision (*Id.* at A21-A23).

REASONS FOR GRANTING THE WRIT

I. THE GRANT TO PLAINTIFF OF LEAVE TO REFILE AND EQUITABLE MODIFICATION OF THE STATUTE OF LIMITATIONS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The Fourth Circuit's grant of leave to refile, and modification of the ADEA's statute of limitations to accommodate Plaintiff's ability to refile his Complaint, is unprecedented where a plaintiff has failed to comply with Section 7(d)'s 60-day conciliation requirement. In the two decisions specifically dismissing ADEA complaints for failure to comply with the jurisdictional 60-day conciliation requirement,[2] neither court granted leave to refile. *See Reich* v. *Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir.), *cert. denied*, 439 U.S. 1009 (1978); *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1076-77 (7th Cir. 1976), *vacated and remanded on other grounds*, 441 U.S. 677 (1978).

Moreover, the Fourth Circuit's modification of the ADEA's statute of limitations to accommodate Plaintiff's ability to refile his Complaint is wholly at odds with the restrictive approach of other courts to equitable tolling of statutes of limitation, both under the ADEA and other legislation. As the First Circuit has recognized, "Courts have taken a uniformly narrow view of equitable excep-

[2] Both decisions were relied upon expressly by the Fourth Circuit in reaching its conclusion that the conciliation period is a jurisdictional prerequisite (App. A, *infra*, at A12).

tions to . . . limitations periods." *Earnhardt* v. *Commonwealth of Puerto Rico*, 691 F.2d 69, 71 (1st Cir. 1982) (Title VII case); *see also Leite* v. *Kennecott Copper Corp.*, 558 F. Supp. 1170, 1173 (D. Mass.), *aff'd mem.*, 720 F.2d 658 (1st Cir. 1983); *Fulton* v. *NCR Corp.*, 472 F. Supp. 377, 383-84 (W.D. Va. 1979) (ADEA cases).

Despite the limited range of such equitable tolling, the court of appeals issued what amounted to an advisory opinion that equitable tolling was warranted in this case, while offering absolutely no case law to support its position. The Fourth Circuit merely cited *Bush* v. *State Industries, Inc.*, 599 F.2d 780 (6th Cir. 1979), as authority for the general proposition that 29 U.S.C. § 255 may be equitably modified where circumstances warrant (App. A, *infra*, at A13). In that case, the Sixth Circuit held that the filing of the complaint tolled the statute of limitations because the district court had subject matter jurisdiction of the action as originally filed. The *Bush* decision offered absolutely no support for tolling the statute of limitations in the present case, however, because the Fourth Circuit here held that the district court never had *jurisdiction* over this action.

Directly contrary to the Fourth Circuit's decision is the decision of the Fifth Circuit in *White* v. *Commercial Standard Fire and Marine Co.*, 450 F.2d 785 (5th Cir. 1971). There the court held that no action could be taken by the district court to forestall the running of the appropriate statute of limitations after the district court found that it lacked jurisdiction over the claim.

Given the limited range of proper equitable tolling in any circumstances and the impropriety of its considera-

tion in the absence of jurisdiction,[3] the Fourth Circuit's equitable modification of the statute of limitations constituted error.

Finally, it is well established that the purpose of the 60-day conciliation period of Section 7(d) of the ADEA is to allow the EEOC the opportunity "to eliminate any alleged lawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d) (1980); *see also* App. A, *infra*, at A8-A11; *Cannon*, *supra*, 599 F.2d at 1077. This conciliation requirement reflects the Congressional purpose that administrative remedies brought by the EEOC be accorded a higher priority than those brought by private parties. *See Reich*, *supra*, 575 F.2d 368 (citing cases).

By granting leave to refile and modifying the ADEA's statute of limitations, the Fourth Circuit's decision allows for satisfaction of this conciliation requirement almost five years after the filing of the original charge. In so allowing, the Fourth Circuit's decision effectively negates the requirement for any conciliation period. By requiring conciliation only after trial and the overwhelming financial and emotional resources expended on the part of both parties, attempted resolution by agency action becomes a useless act, neither foreseen nor intended by Congress.

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[3] Indeed, the Fourth Circuit's reliance on its finding that there was no prejudice to Whirlpool from refiling conflicts with the Eleventh Circuit's recent decision in *Karzanzas* v. *Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 104 S. Ct. 425 (1983), holding that the ADEA statute of limitations was not tolled without considering such issues as prejudice to the defendant.

II. THE LACK OF JURISDICTION PRECLUDED THE COURT OF APPEALS' CONSIDERATION OF WHETHER THE 180-DAY REQUIREMENT OF SECTION 7(d)(1) HAD BEEN EQUITABLY TOLLED AND PLACES THE FOURTH CIRCUIT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In its original opinion, the court of appeals concluded that the federal courts lack jurisdiction in the instant action because of Vance's failure to comply with Section 7(d)'s 60-day conciliation period and did not rule on the merits of Vance's case (App. A *infra*, at A5-A13). In its Supplemental Opinion, however, the Circuit irreconcilably reaffirmed its earlier ruling that the federal court lacked jurisdiction yet went on to rule on one aspect of the merits of Vance's claim, *i.e.*, that in Vance's case the 180-day requirement of Section 7(d)(1) should be equitably tolled (App. B, *infra*, at A19-A20).

It is axiomatic that no federal court can rule on the merits of a case in which it has no subject matter jurisdiction. As noted in Judge Widener's concurring and dissenting opinion in the Supplemental Opinion in this case, *see* App. B, *infra*, at A12-A23, the Supreme Court in *Firestone Tire and Rubber Co.* v. *Risjord*, 449 U.S. 368 (1980), reversed the Eighth Circuit because that court decided the merits of the question appealed after concluding that it had no jurisdiction over the appeal. In so ruling, the Supreme Court stated:

> If the appellate court finds that the order from which a party seeks to appeal does not fall within the [jurisdictional] statute, its inquiry is over. A court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction . . .

Id. at 379.

Prior to or following *Firestone*, numerous other courts of appeals have held that courts, upon finding that they lack jurisdition, must decline to proceed. *See, e.g., United States* v. *40.60 Acres of Land*, 483 F.2d 927 (9th Cir. 1973); *Rock Island Millwork Co.* v. *Hedges Gough Lumber Co.*, 337 F.2d 24, 27 (8th Cir. 1964). *See also Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 918 (3d Cir. 1981); *Warren G. Kleban Engineering Corp.* v. *Caldwell*, 490 F.2d 800, 803 n.2 (5th Cir. 1974); *White* v. *Commercial Standard Fire and Marine Co.*, 450 F.2d 785 (5th Cir. 1971); *Baker* v. *Riss & Company*, 444 F.2d 257, 259 (8th Cir. 1971).

Accordingly, the court of appeal's ruling that Section 7(d)(1)'s 180-day period was equitably tolled, after finding that it had no subject matter jurisdiction, conflicts with the above decisions regarding this general principle. This case presents a classic issue regarding the limited jurisdiction of the federal courts, the importance of which goes to the constitutional core of the federal judicial system. Indeed, the principle of limited jurisdiction of the federal courts is, in the words of Professor Wright, one of "first importance." C.A. Wright, *Law of Federal Courts*, § 7 (3d ed. 1976).

Nor does the expressed logic behind the court of appeals' review of the evidence and jury finding in this single regard justify this new, dramatic and unjustified exception to the general principle. If "the interests of efficiency and conservation of judicial resources" (App. B, *infra*, at A16) justifies the resolution of one disputed issue which might arise in a refiled cause, such rationale would appear to justify the Court in deciding all other issues framed on appeal that might conceivably arise again, thus negating any need whatever for a second

trial, even after its holding that it had no jurisdiction over the case.

III. THE FOURTH CIRCUIT'S DECISION PROVIDING FOR EQUITABLE TOLLING OF THE SECTION 7(d)(1) 180-DAY WAITING PERIOD IN THE CIRCUMSTANCES PRESENTED CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In its Supplemental Opinion, the court of appeals held that "the district court acted properly in submitting to the jury the question whether Vance filed his charge with the Secretary within 180 days from the time he retained a lawyer or obtained actual knowledge of his rights under the ADEA" (App. B, *infra*, at A20). The court further held that the jury's finding that Vance had filed a charge within 180 days of obtaining actual knowledge of his rights was supported by substantial evidence (*Id.* at A20).

The district court did not, however, submit the issue to the jury as stated in the Fourth Circuit's Supplemental Opinion. In fact, the district court instructed the jury that they should find for the Plaintiff if he filed his charge within 180 days of retaining an attorney regardless of the time period in which he had actual knowledge of the rights conferred by the ADEA.[4] This in-

[4] At trial, Judge McMillan instructed the jury that "the plaintiff would not be required to file that notice until he learned or was in a position where he felt like he should have known of his rights under the Age Act. . . ." (App. D, *infra*, at A26). The jury was also instructed that the Plaintiff had 180 days from the time "he first learned that he might have rights in spite of the lateness of the day to bring a suit *and* when he saw a lawyer" (*Id.* at A27) (emphasis added). The trial court then instructed the jury that these questions were "em-

struction was required for the jury to reach its special verdict in view of the uncontradicted evidence in the record that the Plaintiff had actual knowledge of his rights under the ADEA more than 180 days prior to filing a charge.[5]

The Fourth Circuit's reliance on the district court's instructions, and on the jury's verdict founded upon those same instructions, is inconsistent with the other courts which have passed on the issue authority. It is well recognized that, where an employer has failed to post the required ADEA notice, the 180-day period of Section 7(d)(1) begins to run from the time that the plaintiff acquires actual knowledge of his rights *or* retains an attorney. *See Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978); *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

Despite the uncontradicted evidence that Vance had learned of his rights under the ADEA and of its 180-day filing requirement by October of 1978 at the very

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[4] (Continued)

braced within the second issue" which was "Did the plaintiff Wilfred Vance file a charge of age discrimination with the Secretary of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination in Employment Act?" (*Id.* at A27).

[5] At trial, Plaintiff admitted that he learned of his rights under the ADEA at at least one employment agency where he also saw age posters, at some time between May 1977 and October 1978 (App. E, *infra*, at A28-A29). In addition, Plaintiff testified that he was told by the Secretary of Labor of the 180-day filing requirement in October of 1978 (*Id.* at A29-A30).

latest, the Fourth Circuit held that the jury's finding that Vance had filed a charge within 180 days of obtaining actual knowledge of his rights was supported by substantial evidence (App. B, *infra*, at A20). Accordingly, the Fourth Circuit's decision is in conflict with those of other courts of appeals which hold that equitable tolling under the 180-day filing requirement of Section 7(d)(1) is not warranted where plaintiffs had actual knowledge of their rights, even if the employer failed to post an ADEA notice. *See, e.g., Cruce* v. *Brazosport School District*, 703 F.2d 862, 864 (5th Cir. 1983) (refusing to toll 180-day period because plaintiff had opportunity to learn of rights from union representative at grievance hearing); *Hageman* v. *Philips Roxane Laboratories, Inc.*, 623 F.2d 1381, 1386 (9th Cir. 1980) (refusing to toll 180-day period where plaintiff received and read ADEA pamphlet from Department of Labor); *Templeton* v. *Western Union Telegraph Co.*, 607 F.2d 89, 91 (5th Cir. 1979) (per curiam) (refusing to toll 180-day period where plaintiff had seen ADEA poster even though defendant did not have it posted).

As the cases cited above and the many other decisions not referred to attest, plaintiffs routinely attempt to excuse noncompliance with the filing requirement of the statute on a claim that "equity so requires."[6] This Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) in recognizing such equitable considerations set forth no specific guidelines as to the nature or suf-

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[6] *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982). While *Zipes* arose under Title VII, the principle of allowing equitable tolling of the statutorily prescribed filing period has been held fully applicable to ADEA actions. *See, e.g., Kennedy* v. *Whitehurst*, 690 F.2d 951, 961 (D.C. Cir. 1982).

ficiency of the circumstances invoking such equitable intervention. In view of the many, many cases arising both under the statute and Title VII of the Civil Rights Act, and the diametrically opposite results reached on similar facts by the different circuits, the time for this Court's appropriate guidance to the lower courts would appear to be at hand. The instant cause presents just such an opportunity.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 81-1568

WILFRED H. VANCE,

Appellee,

vs.

WHIRLPOOL CORPORATION,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.

JAMES B. MCMILLAN, *District Judge.*

ARGUED: December 9, 1981 DECIDED: May 10, 1983

Before FIELD, *Senior Circuit Judge;* WIDENER and SPROUSE, *Circuit Judges.*

David J. Parsons (Charles J. Griffin, Jr., Seyfarth, Shaw, Fairweather & Geraldson; Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell on brief) for Appellant; Samuel M. Millette, Ernest S. DeLaney, III (Delaney, Millette, DeArmon and McKnight, P.A. on brief) for Appellee.

FIELD, *Senior Circuit Judge*:

This action arises under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (amended 1978) Wilfred H. Vance brought this suit against defendant Whirlpool Corporation (Whirlpool), alleging that Whirlpool terminated his employment in 1977 because of his age.[1] The jury returned a special verdict in favor of Vance. Whirlpool appeals from the judgment for Vance and from the district court's denial of Whirlpool's motion for judgment n.o.v. or in the alternative for a new trial. We vacate the judgment of the district court and dismiss Vance's claim with leave to refile, should Vance be so advised, at the conclusion of conciliation efforts by the Equal Employment Opportunity Commission (EEOC) pursuant to 29 U.S.C. § 626(d).

On May 3, 1977, Vance was discharged from his job with Whirlpool as a territory manager for the Builder Department of the Charlotte Sales Division. At the time of the discharge, Vance was 47 years of age. At trial, Whirlpool asserted that Vance was discharged because of his violation of a well established conflict of interest policy prohibiting the sale or solicitation of orders for non-Whirlpool products by employees while traveling on behalf of Whirlpool. Vance alleged that his discharge was part of a Whirlpool plan to purge its southeast regional sales organization of older employees by replacing them with younger persons.

At the time of the discharge and for over two years thereafter, no notice was posted in Whirlpool's Charlotte sales office setting forth information regarding the rights of employees under the ADEA as required under

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[1] 29 U.S.C. § 623(a)(1) provides:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

29 U.S.C. § 627.[2] Although Vance learned of the ADEA in October of 1978, he asserted that he remained unaware of the possibility that he might have a cause of action under the ADEA until April 1979 when he retained legal counsel.

Vance contended at trial that the delay in learning of his rights under the ADEA rendered it impossible for him to comply with all of the time limitations for filing a charge and a private cause of action, particularly the requirement of § 626(d)(1) that such charges of discrimination be filed within 180 days of the alleged discriminatory discharge. Furthermore, he pointed out that § 626(e) of the ADEA contains a two year statute of limitations on causes of action for nonwillful violations which would have expired in Vance's case on May 2, 1979. Therefore, Vance claimed that it was impossible for him to file a civil suit within the limitations period and still bring a charge with the Secretary of Labor[3] 60 days

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[2] This section provides:

Notice to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

[3] Effective October 1, 1979, all functions vested in the Secretary of Labor pursuant to § 626 of the ADEA were transferred to the EEOC by Section 2 of the Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, *reprinted* in 5 U.S.C.A. app. II, at 159 (Supp. 1982). As the filing in this case occurred prior to the date of transfer of functions, the Secretary of Labor was the correct agency with which to file under the ADEA. For the sake of convenience, throughout this opinion we will refer to the Department of Labor as the agency empowered to enforce the ADEA. The EEOC, of course, is the agency directed to attempt conciliation in this matter pursuant to our ruling. *See Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 711 (1974).

prior to the commencement of his civil action as required by § 626(d). Faced with this dilemma, Vance decided to file suit and notify the Secretary of Labor of his charge simultaneously.

On May 3, 1979, the Charlotte Area Director of Labor wrote Whirlpool informing it of the charge and setting a conference for May 10, 1979. Whirlpool's attorney subsequently advised the Director that Vance's action in the district court precluded conciliation with the Department of Labor, and no conciliation efforts ensued. Whirlpool filed a motion for summary judgment, contending that Vance had failed to comply with the statutory mandate of the ADEA by not waiting 60 days after bringing a charge before filing suit in federal district court and by not filing his charge with the Department of Labor within 180 days of the allegedly discriminatory act. On May 13, 1980, the district court entered an order denying Whirlpool's motion.

The case was tried before a jury which returned a special verdict in favor of Vance. Based on the jury's verdict and its own findings, the district court entered an order on May 29, 1981, holding that the 180-day filing period of 29 U.S.C. § 626(d)(1) was equitably tolled until April of 1979 when Vance retained an attorney and acquired actual knowledge of his rights under the ADEA. The district court further found that Whirlpool was equitably estopped from asserting the 60-day conciliation period in 29 U.S.C. § 626(d) because of Whirlpool's failure to comply with its statutory duty to make Vance aware of his rights under the ADEA. The district court also determined that in any event, the statutory purpose underlying the 60-day conciliation period had been satisfied since Whirlpool was already aware of allegations of age discrimination in its Charlotte office[4] and since Whirlpool had been afforded a fair

[4] The district court found that Whirlpool was aware of such allegations by virtue of an age discrimination charge filed with the Department of Labor by Vance's

opportunity to conciliate the charge by both the Department of Labor and the district court.[5] Consequently, the district court ruled that it had jurisdiction to hear the action and entered judgment for Vance. Following the denial of its motion for judgment n.o.v., Whirlpool appealed to this Court.

Whether the 60-day waiting period of 29 U.S.C. § 626 (d) is a jurisdictional prerequisite to the maintenance of a suit under the ADEA has not been addressed by the Supreme Court, nor have we had occasion to consider the question. However, the legislative history of the ADEA provides substantial insight into the nature of the 60-day notice requirement of § 626 (d). The House Report on the original Act clearly indicates in three separate passages that § 626(d) requires conciliation before any legal action may be instituted. In discussing enforcement of the provisions of the ADEA, the Report stresses the integral role of conciliation under the statutory scheme in actions brought by either the Secretary or private individuals, stating

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[4] (Continued)

superior in January of 1978 and the subsequent lawsuit filed in March of 1978. *See Spagnuolo* v. *Whirlpool Corporation*, 641 F.2d 1109 (4 Cir.), *cert. denied*, 454 U.S. 860 (1981). Because we rule that the district court erred in finding that the 60-day notice period may be equitably tolled, we do not reach the question raised by Whirlpool on appeal whether this earlier case was properly entered into evidence and considered by the district court.

[5] The record on appeal discloses that Whirlpool steadfastly refused to engage in conciliation on the grounds that Vance's claim was time-barred and that the pending civil action precluded conciliation. Because we rule that the 60-day requirement of § 626(d) may not be equitably tolled, we do not consider whether Whirlpool's "opportunity" to conciliate, either alone or in conjunction with the other facts surrounding this case, would warrant equitable tolling.

> It is intended that the responsibility for enforcement vested in the Secretary by section 7, *be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense.*

H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218 (emphasis supplied). In further discussing enforcement of the ADEA, the Report states that the legislation

> Directs the Secretary to attempt to secure voluntary compliance through conciliation before instituting action, and *requires* 60 days' notice to the Secretary by persons intending to file civil actions to provide time for informal methods to bring about compliance with the act.

Id., reprinted in [1967] U.S.Code Cong. & Ad.News 2213, 2218 (emphasis supplied). A few pages later, we read in an analysis of the bill that

> Subsection (d) requires that persons intending to file civil actions under this act *must* give the Secretary of Labor 60 days' notice before doing so. During the 60-day period, the Secretary would seek to eliminate unlawful practices by informal methods of conciliation, conference, and persuasion.

Id. at 9, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2223 (emphasis supplied). This explicit discussion of the requirement of 60 days' notice stands in sharp contrast to the absence of any mention of the 180-day charge requirement under § 626(d)(1) in the legislative history of the original Act, and indicates that Congress intended conciliation efforts under § 626(d) to be a strict condition precedent to the initiation of any litigation in federal courts.

The legislative history of the 1978 amendments lends further support to this interpretation of § 626(d). The Conference Report explicitly points out that neither the

180-day requirement of § 626(d)(1) nor the conciliation requirement of § 626(b) (regarding actions initiated by the Secretary of Labor) was intended as a jurisdictional prerequisite to maintaining a cause of action under the ADEA. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. at 12-13, *reprinted in* [1978] U.S.Code Cong. & Ad. News 504, 534. However, throughout this discussion of procedural amendments to the Act no reference is made to the 60-day waiting period of § 626(d). It may reasonably be inferred that by this omission Congress intended the 60-day period to remain a jurisdictional prerequisite to the initiation of a private action, as it had indicated in the 1967 legislative history.

Finally, we note that in 1978 when Congress liberalized the requirements of § 626(d) by requiring merely that a "charge" rather than a notice of intent to sue be filed with the Secretary, Congress reiterated the fact that the notice and conciliation requirements of § 626(d) were central to the statutory scheme and stressed that these requirements remained unaltered by the amendment. The Conference Report on this point reads as follows:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement which identifies the potential defendant and generally describes the action believed to be discriminatory.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess 12, *reprinted in* [1978] U.S.Code Cong. & Ad.News 504, 534. We find this passage to be a clear statement that by the 1978 amendment to § 626(d) Congress intended only to insure that failure to file a formal notice of intent to

sue would not stand as a bar to relief under the ADEA. We find this excerpt to represent an equally clear statement that the 60-day notice requirement was not relaxed in any degree by the 1978 amendments, and that Congress intended to preserve the conciliation requirement as a prerequisite to the initiation of a private action under the ADEA.

We do not agree with Vance that the 60-day period and the 180-day filing period should be treated alike for the two requirements serve separate and distinct purposes. The 180-day charge requirement is more in the nature of a statute of limitations designed to preclude the maintenance of stale claims. *See Zipes* v. *Trans World Airlines, Inc.*, —— U.S. ——, 102 S.Ct. 1127, ——, 71 L.Ed.2d 234, 243 (1982). On the other hand, the 60-day waiting period is an absolute period of abstention by the federal judiciary intended to enhance judicial economy by promoting the exhaustion of administrative remedies through the Department of Labor prior to the institution of a private suit. We elaborated on the function of the 60-day period in *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4 Cir. 1979), where we stated

> The ADEA provides that resort must first be had to administrative remedies before a private suit may be filed. Any individual who wishes to sue under the ADEA must give the Secretary of Labor sixty (60) days notice of intent to sue. Upon receipt of such notice, the Secretary is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). If such efforts fail, the Secretary may bring an action under the statute. Most significantly, the right to bring a private suit terminates upon commencement of an action by the Secretary. § 626 (c). *Thus, the entire thrust of the ADEA's enforcement provision is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.*

Id. at 1296 (emphasis supplied). Since we view the two requirements as serving entirely distinct functions, we are unpersuaded by Vance's arguments that the 60 and 180-day requirements should be treated similarly.

Vance also relies upon two other sections of the ADEA to support his contention that the 60-day waiting period of § 626(d) is not a jurisdictional prerequisite to a private cause of action. First, Vance looks to 29 U.S.C. § 633(b), which provides that where an alleged discriminatory action occurs in a state prohibiting age discrimination, the aggrieved employee may not file a cause of action until 60 days after proceedings have been commenced pursuant to state law. In *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979), the employee filed a federal, but not a state age discrimination charge. After federal conciliation efforts failed he brought suit in federal court against his former employer. Ruling that the employee's failure to file a state charge did not deprive the district court of jurisdiction, the Supreme Court ordered the district court to hold the federal suit in abeyance until the employee had filed a state charge and the state agency had been given an opportunity to entertain his grievance. *Oscar Mayer,* 441 U.S. at 764, 99 S.Ct. at ——.

Vance derives from *Oscar Mayer* the proposition that if the 60-day waiting period associated with state administrative remedies may be modified, then the same must be true of the 60-day period concerning federal administrative remedies. However, the complainant in *Oscar Mayer* had properly exhausted his federal administrative remedies, and the Supreme Court's decision said nothing to diminish the importance of conciliation to the federal scheme within the ADEA. An aggrieved employee under the ADEA may file state and federal charges simultaneously, and regardless of the presence of state administrative remedies, an employee must observe the federal administrative process in § 626(d) to accord with the goal of administrative exhaustion prior

to resort to the federal judiciary. (*See id.* at 764, 99 S.Ct. at ——.

Vance's second argument that the 60-day period is not a jurisdictional prerequisite to a private cause of action is based upon 29 U.S.C. § 626(b). Section 626(b) requires that the Secretary of Labor attempt to persuade employers through informal conciliation to voluntarily comply with the ADEA before the Secretary institutes a civil suit. Two circuits have held that the conciliation requirement in § 626(b) is not jurisdictional, and that a district court has the equitable discretion to stay a lawsuit pending before it in order to allow the completion of conciliation before the suit continues. *Marshall* v. *Sun Oil Co.*, 605 F.2d 1331, 1337 n.8 (5 Cir. 1979); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 376 (8 Cir. 1974). Vance has suggested that since the conciliation requirement of § 626(b) is not jurisdictional, then neither is the 60-day period of § 626(d). We disagree.

We note initially that the two sections in question differ in form, substance, and purpose. Subsection (b) of § 626 is concerned with enforcement of the provisions of the ADEA by the Secretary of Labor; it empowers the Secretary to pursue compliance through conciliation and, in the event efforts at conciliation fail, to institute legal action. No time limits are imposed upon the Secretary other than the statutes of limitation found in § 626 (e). *See Brennan*, 495 F.2d at 376 (Secretary not held to rigid guidelines in attempting conciliation under § 626(b)). By way of contrast, subsection (d) of § 626 constitutes an express restriction on the right of an individual to bring a private suit under the ADEA, and specific time limitations are imposed upon the individual. Furthermore, the Secretary must be given an opportunity to resolve the matter before any cause of action accrues to the individual. Indeed, even when a timely private suit is initiated under the ADEA, a suit by the Secretary supersedes the private suit. 29 U.S.C. § 626(c). The fact that under § 626(d) the individual's right to

bring a cause of action is subordinate to the Secretary's power to enforce compliance is established by the legislative history. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218. Thus, it is clear that unlike subsection (b), which deals exclusively with the Secretary's enforcement powers under the ADEA, subsection (d) is designed to insure that the primary mechanism of dispute resolution —informal conciliation efforts pursued by the Secretary —is fully utilized before individuals are entitled to relief in the federal courts. *See id., reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218.

Marshall v. *Sun Oil Co., supra,* and *Brennan* v. *Ace Hardware Corp., supra,* cited by Vance in support of his argument differ fundamentally from the case at bar. Unlike the present case, the Secretary of Labor brought the lawsuits in *Marshall* and *Brennan.* Actions initiated by the Secretary before the termination of conciliation would not place undue pressure on the employer to settle the charge, since the threat of a suit by the Secretary pursuant to § 626(b) is a factor present from the beginning of the conciliation negotiations. However, allowing a private suit to be filed prior to the expiration of the 60-day period would introduce into the conciliation process a new factor which would strip the conciliation requirement of its very function in the remedial scheme of the ADEA. No meaningful conciliation efforts could transpire if at any time during the 60-day period the individual could initiate suit in federal court and thereby preempt conciliation. Section 626(d) is specifically designed to insure that conciliation is immune from such private preemption for 60 days.

Moreover, the ruling in *Marshall* that the conciliation requirement of § 626(b) was not jurisdictional in a strict sense was premised on a rationale inapplicable to cases arising under § 626(d). In *Marshall* the Court reasoned that since the Secretary's cause of action bars a private suit by the employee, dismissal of the Secretary's suit

on grounds that it was filed prematurely would unfairly penalize the employee by conditioning his right to relief on "events beyond his control which are not spelled out in the statute." 605 F.2d at 1337 n.8, *quoting Franks* v. *Bowman Transp. Co.*, 495 F.2d 398, 404 (5 Cir. 1974), *rev'd in part on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). Where the employee brings suit himself in violation of the 60-day waiting period, his right to relief is lost due to events entirely under his own control under requirements which are explicitly spelled out in the statute. In our opinion the rationale upon which the *Marshall* court relied in finding the conciliation requirement of § 626(b) to be nonjurisdictional applies only to actions brought by the Secretary, and is inapplicable to cases arising under § 626(d).

We note finally that other circuits which have considered the question have held that the 60-day period of § 626(d) is jurisdictional and that the failure of the employee to comply with this waiting period will result in the dismissal of his private civil action. *Wright*, 628 F.2d at 953 (6 Cir. 1980) (en banc); *Reich* v. *Dow Badische Co.*, 575 F.2d 363, 367-68 (2 Cir. 1978); *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1077 (7 Cir. 1976) *rev'd in part and remanded on other grounds*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). We agree with these circuits that the language of § 626(d) indicates that the 60-day notice period is jurisdictional, *Ewald* v. *Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183, 1187-88 (6 Cir. 1980), and that the 60-day requirement is designed to assure the primacy of conciliation managed by the Department of Labor in the remedial scheme of the ADEA. *See Reich*, 575 F.2d at 368. Accordingly, we hold that the district court erred in equitably modifying this requirement and entertaining Vance's suit.

Our conclusion with respect to the 60-day waiting period requires that the judgment in favor of Vance be vacated and the case remanded to the district court with

instructions to dismiss the complaint. Despite this disposition of the appeal, however, we are of the opinion that Vance may yet comply with the mandate of § 626(d) by pursuing with the EEOC[6] his charge of discriminatory conduct by Whirlpool. Should conciliation efforts by the EEOC prove fruitless, Vance may refile his complaint in the district court. While we recognize that "[s]uspension of proceedings is preferable to dismissal with leave to refile," *Oscar Mayer*, 441 U.S. at 765 n.13, 99 S.Ct. at —— n.13, such a procedure is foreclosed in the present case since the district court was utterly without jurisdiction to entertain Vance's lawsuit. To countenance the prematurity of the proceedings in this case in the district court, including the trial, would require that we ignore the definitive structure of the ADEA and the congressional mandate that resort to administrative remedies shall be a prerequisite to an action in the federal court. Consequently, dismissal of the action with leave to refile is the appropriate remedy under the peculiar facts of this case.

The statute of limitations does not bar the procedure we propose. While the statute is not automatically tolled under § 626(e) for subsection (d) cases as it is for subsection (b) cases, it is clear that the statute of limitations of 29 U.S.C. § 255 (incorporated under § 626(e)) may be equitably modified where circumstances warrant. *See, e.g., Bush* v. *State Industries, Inc.*, 599 F.2d 780 (6 Cir. 1979). In our opinion it is proper in this case to modify the requirements of 29 U.S.C. § 255 to permit Vance to refile in district court should conciliation efforts prove unsuccessful. There has been no demonstration of prejudice to Whirlpool should refiling be permitted, and Vance's simultaneous filing with the Secretary of Labor and the district court, though improper, was not an unreasonable course of action to follow given his dilemma and the dearth of clear precedent regarding his particu-

[6] *See supra* note 3.

lar situation. Vance should not be penalized for his conduct here by loss of his right to bring suit in federal court in the event conciliation attempts are unsuccessful.[7]

Accordingly, the judgment of the district court is vacated and Vance's claim is dismissed with leave to refile his action consistent with this opinion should he be so advised.

JUDGMENT VACATED AND DISMISSED.

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[7] Both parties briefed and argued the question of whether the 180-day filing period of § 626(d)(1) is a jurisdictional prerequisite and could be equitably tolled in this case. However, since we conclude that the 60-day notice period of § 626(d) precluded jurisdiction in the district court, we do not reach the issue of the jurisdictional dimensions of the 180-day requirement or the circumstances under which it might be tolled.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 81-1568

WILFRED H. VANCE,

Appellee,

versus

WHIRLPOOL CORPORATION,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

Before FIELD, Senior Circuit Judge; WIDENER and SPROUSE, Circuit Judges.

David J. Parsons (Charles J. Griffin, Jr., Seyfarth, Shaw, Fairweather & Geraldson; Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell on brief) for Appellant; Samuel M. Millette, Ernest S. DeLaney, III (DeLaney, Millette, DeArmon and McKnight, P.A. on brief) for Appellee.

SUPPLEMENTAL OPINION ON PETITION
FOR REHEARING

FIELD, Senior Circuit Judge:

In this case under the Age Discrimination in Employment Act of 1967 (ADEA) the defendant, Whirlpool, appealed from a judgment rendered in favor of the plaintiff. Among other arguments advanced by it on appeal, Whirlpool contended that the district court erred in holding that the 180-day filing period of 29 U.S.C. § 626(d)(1) had been equitably tolled, and that the court further had improperly concluded that Whirlpool was equitably estopped from asserting the 60-day conciliation period under 29 U.S.C. § 626(d) as a bar to the plaintiff's action. Concluding that the 60-day conciliation period of section 626 (d) is jurisdictional, we held that the district court erred in equitably modifying this requirement and entertaining the plaintiff's suit, vacated the judgment in favor of Vance, and remanded the case with instructions to dismiss the complaint. *Vance* v. *Whirlpool Corp.*, 707 F.2d 483 (1983). Since we concluded that the 60-day notice requirement precluded jurisdiction in the district court, we declined to reach the issue of the jurisdictional dimensions of the 180-day requirement of the statute or the circumstances under which it might be tolled. 707 F.2d 490, footnote 7.

Counsel for the plaintiff filed a petition for rehearing suggesting, among other things, that it was incumbent upon us to consider and dispose of the issue with respect to the 180-day requirement of the statute. Upon reflection, we agree with counsel that the interests of efficiency and conservation of judicial resources would best be served by our disposition of that issue. To that end we are supplementing the original opinion as follows.

Although no Supreme Court opinion has addressed the question whether the 180-day requirement of 29 U.S.C. § 626(d)(1) of the ADEA is jurisdictional in nature, the Court recently ruled that a similar provision in Title VII of the Civil Rights Act of 1964[1] is not a jurisdictional

[1] 42 U.S.C. §§ 2000e *et seq.*

prerequisite to suit in a district court. *Zipes* v. *Trans World Airlines, Inc.*, —— U.S. ——, 102 S.Ct. 1127, ——, 71 L.Ed.2d 234, 243 (1982). While the procedural requirements of Title VII and the ADEA are not identical, *see Naton* v. *Bank of California*, 649 F.2d 691, 695 n.3 (9 Cir. 1981); *Bean* v. *Crocker National Bank*, 600 F.2d 754, 758-59 (9 Cir. 1979), both statutes contain a 180-day filing provision,[2] and it is clear that the Supreme Court's interpretation of this provision under Title VII provides significant interpretive authority of the like provision in the ADEA. *See Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979); *Coke* v. *General Adjustment Bureau, Inc.*, 640 F.2d 584, 587 (5 Cir. 1981). We find the Supreme Court's ruling in *Zipes* to be highly persuasive authority for interpreting the 180-day requirement of § 626(d)(1) as nonjurisdictional and subject to equitable modification.

We, ourselves, have not yet passed on the question whether the 180-day filing period of the ADEA is jurisdictional in nature or whether it may be equitably tolled, *see Smallwood* v. *United Air Lines, Inc.*, 661 F.2d 303, 309 (4 Cir. 1981), and the legislative history of the original Act provides little guidance on the question. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5-6, 9 *reprinted in* [1967] U.S.Code Cong. & Ad.News 2213, 2218, 2223. In the legislative history of the 1978 amendments to the ADEA, however, Congress specifically addressed the is-

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[2] The notice requirement applicable to Title VII is set forth in 42 U.S.C. § 2000e-5(e)(1974), and provides in pertinent part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter.
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> • • •

sue of equitable tolling of the 180-day period, stating that:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. *See, e.g., Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), affirmed by an evenly divided court, [434 U.S. 99] 98 S.Ct. 600 [54 L.Ed. 472] (1977); *Bonham* v. *Dresser Industries, Inc.*, 16 FEP Cases 510 (3d Cir. 1977); *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977).

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S.Code Cong. & Ad.News 504, 534. Although subsequent legislative observations are not considered a part of the legislative history of an act, *Oscar Mayer*, 441 U.S. at 758, 99 S.Ct. at 2072, it is firmly established that subsequent legislative history is entitled to some weight, particularly where the intent of the enacting Congress is obscure. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596, 100 S.Ct. 800, 814, 63 L.Ed.2d 54 (1980); *Coke*, 640 F.2d at 594 (5 Cir. 1981). The 1978 amendments would indicate that Congress had the opportunity to correct the prevailing view of the courts that the 180-day period was subject to equitable tolling had it desired to do so, and that Congress elected to endorse that view. We believe that this legislative history provides a substantial basis for concluding that equitable modification of the 180-day requirement is permissible where circumstances warrant.

This reading of the statute finds support in the decisions of other circuits which have had occasion to consider the issue since the 1978 amendments to the ADEA. *See, e.g., Naton*, 649 F.2d at 696 (9 Cir. 1981); *Coke*, 640 F.2d at 595 (5 Cir. 1981); *Wright* v. *State of Tennessee*, 628 F.2d 949, 953 (6 Cir. 1980) (en banc); *Niel-*

sen v. *Western Electric Company, Inc.*, 603 F.2d 741, 743 (8 Cir. 1979); *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287, 1289 (7 Cir. 1978). In light of the Supreme Court's interpretation in *Zipes* together with our reading of the legislative history, we are in substantial agreement with those circuits which have considered the issue and held that the 180-day requirement of 29 U.S.C. § 626(d)(1) may be equitably tolled where circumstances warrant.

The question remains whether the circumstances of this case warrant equitable tolling of the 180-day period. Concededly, Whirlpool violated its statutory duty under the Act by neglecting to post a notice in its Charlottee office informing its employees of their rights under the ADEA. Such a notice is required to be posted in a prominent place on the employer's premises. 29 C.F.R. § 1627.10 (1981). Congress imposed this requirement to insure that covered employees would be informed of their rights, and in the present case Whirlpool's failure to post such a notice prevented Vance from learning of his ADEA rights at the time of his discharge. Under the circumstances the district court was correct in holding that the 180-day period should be tolled by reason of Whirlpool's failure to post the statutory notice. *See Kephart*, 581 F.2d at 1289; *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 193 (3 Cir. 1977), *cert. denied* 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

Once the 180-day period has been tolled due to the employer's failure to post the statutory notice, it has been held that the period will begin to run from the time that the employee acquires actual knowledge of his rights or retains an attorney. *See Kephart*, 581 F.2d at 1289; *Bonham*, 569 F.2d at 193. In the present case the issue as to when Vance obtained actual knowledge of his rights was disputed. During a visit to an employment agency in October of 1978, Vance observed the statutory notice and learned of his rights under the Act. He thereupon contacted the Department of Labor, but was advised by

an employee of the Department that his charge against Whirlpool was time-barred by reason of the 180-day requirement. In the light of this information, Vance did not attempt to file a charge, and he testified at trial that he first learned that he might have a viable claim in April of 1979 when upon the advice of a friend he consulted an attorney. Whirlpool contends that the notice period began to run in October of 1978 when Vance saw the statutory notice and learned of his rights under the Act. Therefore, Whirlpool argues, Vance's charge in May of 1979 was time-barred. Vance counters that his charge was not barred since the notice period did not start to run until April of 1979 when the attorney advised him that he did, in fact, have a right to bring such a charge against Whirlpool.

Ordinarily, we would agree with Whirlpool that the 180-day period should be tolled only until such time as an employee observes the statutory notice or otherwise learns of his rights under the ADEA. Here, however, the period had already run when Vance saw the notice, and in our opinion he acted reasonably in assuming that his claim was barred, especially in view of the advice which he received from the employee of the Department of Labor. Under these circumstances, we think the district court acted properly in submitting to the jury the question whether Vance filed his charge with the Secretary within 180 days from the time he retained a lawyer or obtained actual knowledge of his rights under the ADEA. Since the jury found in its special verdict that Vance had filed a timely charge, and its finding is supported by substantial evidence in the record, the district court acted properly in holding that the 180-day filing period had been tolled until April of 1979.

Subject to this supplemental opinion, we affirm our previous opinion and mandate vacating the judgment in this case.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in the original opinion of this panel published at 707 F.2d 483 (4th Cir., May 10, 1983), I must respectfully dissent to its supplemental opinion.

In the original opinion of the panel, we held the district court was without jurisdiction and directed that the action be dismissed. Indeed, this direction of dismissal is repeated in the last paragraph of the supplemental opinion.

I think the proposition too plain for argument that if the district court had no jurisdiction to decide the merits of the case, then its judgment had to be vacated for it was powerless to decide any of the merits, specifically including whether or not the 180-day filing period of 29 U.S.C. § 626(d)(1) had been equitably tolled.

I think it equally plain that if the district court had no jurisdiction to decide that matter, then we have no jurisdiction to decide that or any other matter in the case once we have concluded that the district court was without jurisdiction.

The Supreme Court has addressed this proposition quite clearly in *Ex parte McCardle*, 74 U.S. 264, 7 Wall. 506 (1869). In the *McCardle* case, the Supreme Court's jurisdiction to hear the case being appealed was taken away by Congress during the pendency of the appeal, indeed, after argument thereof. 74 U.S. at 265. The question before the Court was whether or not the Act of Congress passed while the appeal was pending had taken away the Court's jurisdiction to hear the appeal. The Court held that the statute had just that effect and in its discussion said:

> Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." 74 U.S. at 265.

Later in the same opinion, the Court said with respect to pronouncing judgment in the case:

> "It is quite clear, therefore, that this Court cannot proceed to pronounced judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and laws confer." 74 U.S. at 265, 266.

Lest there be any doubt that *McCardle* suffers from an infirmity of age (*Marbury* v. *Madison*, 1 Cranch 137 (1803), certainly does not), the Court has only recently restated the same principle in *Firestone Tire & Rubber Co* v. *Risjord*, 449 U.S. 368 (1980). In *Firestone* the Court decided that an order refusing to disquality an attorney was not an appealable order and reversed the Eighth Circuit which had decided that point to the same effect, but had made its decision prospective only and had reached the merits of the question appealed. It was because the Eighth Circuit "reached the merits of the order appealed from," 449 U.S. at 379, that it was reversed. The Court stated the proposition clearly in part III of its opinion:

> "If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks jurisdiction to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be prospective only. We therefore hold that because the Court of Appeals was without jurisdiction to hear the appeal, it was without jurisdiction to decide the merits." 449 U.S. at 379.[1]

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[1] We have cited this proposition from *Firestone* with approval in *American Federation, etc.* v. *Federal Labor Board Auth.*, 675 F.2d 612 (4th Cir. 1982).

I suggest that our court is doing in this opinion precisely what the Supreme Court declined to do in *McCardle* and reversed the Eighth Circuit for doing in *Firestone*. W are pronouncing judgment in a case in which there was no jurisdiction in the district court, much less in our own.

Without discussion of the philosophical underpinnings which make obligatory upon Article III courts the rule of *McCardle* and *Firestone*, it will suffice for me to say at this time that I think we exceed our warrant.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1568

Wilfred H. Vance,

Appellee,

versus

Whirlpool Corporation,

Appellant.

ORDER

Upon consideration of appellant's petitions for rehearing and suggestions for rehearing en banc, filed May 24, 1983 and September 12, 1983,

IT appearing to the court that the original petition was granted to the extent the supplemental opinion modified the initial decision of the court. No active judge of the court having requested a poll on either petition, the subsequent petition for rehearing with suggestion for rehearing en banc hereby is denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Field. Judge Widener dissents from the modification of the initial panel decision.

For the Court,

WILLIAM K. SLATE II
CLERK

Filed October 27, 1983

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

WILFRED H. VANCE,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

Case No. C-C-79-140

Hon. James B. McMillan

CHARGE TO THE JURY

March 27, 1981

[Following general instructions regarding function, evaluation of testimony, burden of proof, and basic statutory language].

I think I will now deal specifically with the issues you have to decide, not necessarily in one complete pass but I'll start dealing specifically with those issues. The first issue is whether Whirlpool failed to post and keep posted in conspicuous places on its premises an age discrimination notice or notices of the kind approved by the Secretary of Labor, and I don't know much I can say about that except if I heard all the evidence correctly, all the evidence tends to show that there were no such posters put up at the employer's premises at the time pertinent to this case; and if you believe the evidence on that subject, you would answer the first issue yes—that is, that Whirlpool did fail to post those posters. That sounds like, on the face of it, an im-

material question but it feeds into the second issue, which is did the plaintiff, Wilfred Vance, file a charge of age discrimination with the Secretary of Labor within 180 days after retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination Act. The statute which I read requires that notice of intention to sue be filed by a person who claims he's been denied rights because of age, notice of intention to sue be filed within 180 days from the date of the act.

Now, without going into all of the, without going further into that question, if there was no age poster put up, then the plaintiff would not be required to file that notice until he learned or was in a position where he felt like he should have known of his rights under the Age Act; and in this case, the testimony, as I recall it, was that notice of intention to sue, that is, the claim was not, in fact, filed until a short time before the suit was started in, what was that, 1979?

MR. MILLETTE: Yes, Your Honor.

MR. GRIFFIN: Yes, Your Honor.

COURT: The evidence, of course, shows what you will find it to show with regard to the posting of the notice, and the testimony of the plaintiff—again, I'm not telling you what he said but, as I recall it, his testimony was that he was unfamiliar with the Age Act, that sometime following his discharge he learned that there was an Age Act, and he called the Secretary, somebody in the government office who deals with this and asked about his rights; and when he was, when he told that person in the Labor Office that this had happened to him more than six months earlier, he was told that his rights were barred by the statute of limitations and that they couldn't do anything for him. He said later that he learned that there had been some suit that had been allowed to be maintained in such a case even though it was not brought within the period allowed by the statute, and he then went to the lawyer

and the lawyer brought the suit within a few days or weeks after he first saw the lawyer and first learned that there might be circumstances under which, in spite of the bar of the statute, he would be entitled to bring suit.

So, your question here is whether the plaintiff, well, first, you've got to decide from the evidence, not from what I have said by way of recounting of some of the evidence but from the evidence, you have to find when he first learned that he might have rights in spite of the lateness of the day to bring a suit and when he saw a lawyer and when the suit was filed and whether, or, rather, the notice, and then you have to determine when the notice was filed with the Secretary and when the suit was filed. All of those questions are embraced within the second issue which you will decide. "Did the plaintiff Wilfred Vance file a charge of age discrimination with the Secretary of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination in Employment Act?" If you answer the second issue yes, you would go to the third issue which is, "Did the defendant Whirlpool Corporation refuse to conciliate with the Department of Labor concerning the plaintiff's charge of age discrimination?"

(Transcript of Proceedings, at 727-30).

. . .

[Other instructions followed, none regarding the 180-day filing period of Section 7(d)(1)]

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

WILFRED H. VANCE,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

Case No. C-C-79-140

Hon. James B. McMillan

PORTION OF PROCEEDINGS ON MARCH 27, 1981

[Direct Examination of Wilfred H. Vance, By Mr. Millette]

• • •

Q. When did you first learn anything about age discrimination?
A. Approximately October, 1978.
Q. And where were you on that occasion?
A. I was at an employment office here in town some place.
I don't remember the name.
Q. As a result of going there to that employment office, did you secure some information and then call the United States Department of Labor?
A. I sure did, yes, sir.

• • •

(Transcript of Proceedings, at 36).

[Cross Examination Of Wilfred H. Vance, By Mr. Griffin]

* * *

Q. Did you use any employment agencies?
A. I sure did.
Q. Didn't you notice in the employment agencies the age posters?
A. As I recall, I saw it in one employment agency I went into, yes, sir.
Q. And when was that?
A. That was sometime in October, as I recall, 1978.
Q. What makes you think it was October, 1978, and not earlier?
A. It was prior to my going to work at my present company, and I remember it was a few days beforehand.
Q. And your present company is Virco?
A. Yes, sir.
Q. Was it seeing the age poster that caused you to call the Department of Labor?
A. No, sir. One of the people in the employment agency said that you're going to have a hard time, for me to be able to place you. You're too old, said this is off the record. He pointed to the 40 to 65 age thing on the wall and suggested that I contact the U.S. Department of Labor.
Q. When was that?
A. Shortly thereafter. It might have been the same day.
Q. You say it was in October of '78?
A. October of '78, yes, just prior to going to work for my present company.
Q. That is 18 months after you were terminated, roughly?
A. Yes, sir.
Q. Do you recall testifying in a trial in this Federal District Court, a trial held on October 23, 1979, when you were asked this question . . .
MR. MILLETTE: What page are you on?

MR. GRIFFIN: Pages 164, 165.
Q. "In the meeting, in that meeting, isn't it true you said absolutely nothing to Ms. Dahlstrom about age being any factor whatsoever in your termination?" Your answer was, "I don't recall discussing age, Mr. Ross. I sure don't. In fact, I didn't learn anything about the age situation until I kept looking for a job and they said you're too old. You're 47 years of age. That's off the record. Then I called the Labor Board after six or eight months. The Labor Board said you've waited too long, and I kept looking for a decent job, looking for one." Do you remember answering the question that way?
A. I remember that.
Q. Your testimony today is that you found out when you called the Labor Department . . .
A. That six or eight months was relative. I couldn't be sure of the time. I know it was prior to going to work for my present company.
Q. Now it's 18 months, approximately?
A. It was in October.
Q. Eighteen months ago, you testified it was about six or eight months after termination.
A. That is correct if that is what that says, but I apparently was wrong at the time.

(Transcript of Proceedings, at 95-97).